AHMAD RADUAN AWANG BOL

v.

PP

COURT OF APPEAL, KUALA LUMPUR
DENIS ONG JCA
MOHD SAARI YUSOFF JCA
MOHD NOOR AHMAD JCA
[CRIMINAL APPEAL NO: Q-05-92-97]
30 NOVEMBER 2002

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Defence of sudden fight - Exception 4 to s. 300 - Whether taken into consideration by learned judge - Whether failure to do so a misdirection - Whether charge reduced to s. 304*

The accused was sentenced to death by the learned judge of the High Court for murder under s. 302 Penal Code. Hence, this appeal by the accused.

The issues were: (1) whether the learned judge omitted to consider a possible defence of sudden fight; and (2) whether that omission led to a misdirection.

Held:
Per Mohd Saari Yusoff JCA

[1] The evidence showed a possible defence of a sudden fight as envisaged under exception 4 to s. 300 Penal Code in which the learned judge failed to consider. Such omission would tantamount to misdirection. At the time of the accident, the accused was armed with an axe and a knife. It was quite possible that had the learned judge directed his mind on exception 4, the very nature of the stab wounds inflicted on the deceased might be held to have taken the case out of the exception. However, this was a question of fact for the learned judge to have considered.

[2] This was a serious offence that cost the life of another human being. The killing was cold-blooded and a deterrent sentence of 18 years' imprisonment from the date of arrest was manifestly adequate in the circumstances.

[Appeal allowed; verdict of culpable homicide not amounting to murder under s. 304 Penal Code.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Tertuduh dihukum mati oleh hakim arif Mahkamah Tinggi kerana membunuh di bawah s. 302 Kanun Keseksaan. Maka rayuan ini oleh tertuduh.

Isu-isunya adalah: (1) sama ada hakim arif gagal untuk mempertimbangkan kemungkinan satu pembelaan "sudden fight"; dan (2) sama ada kegagalan tersebut adalah satu salah arah.

Diputuskan:
Oleh Mohd Saari Yusoff HMR

[1] Keterangan menunjukkan kemungkinan satu pembelaan "sudden fight" di bawah kekecualian 4 kepada s. 300 Kanun Keseksaan. Hakim arif gagal untuk mempertimbangkannya. Kegagalan tersebut adalah satu salah arah. Pada masa kejadian tersebut, tertuduh membawa sebilah kapak dan sebilah pisau. Ada kemungkinan bahawa jika hakim arif menujukan perhatiannya kepada kekecualian 4 tersebut, sifat tersendiri kelukaan tertuduh disebabkan tertikam akan membawa kes keluar daripada kekecualian itu. Tetapi ini adalah satu soalan fakta untuk dipertimbangkan oleh hakim arif.

[2] Kesalahan tertuduh adalah serius dan telah membawa kepada kehilangan nyawa seorang manusia. Pembunuhan tersebut adalah kejam dan hukuman mencegah 18 tahun daripada tarikh tahanan memadai dalam keadaan tersebut.

Rayuan dibenarkan; keputusan homisid salah tak terjumlah membunuh di bawah s. 304 Kanun Keseksaan.]

Legislation referred to:
Penal Code, ss. 302, 304(a)

For the appellant - Hii Hieng Sing; M/s Hii & Co
For the respondent - Nurulhuda Mohamed Nor DPP

[Editor's note: The Public Prosecutor has filed an appeal to the Federal Court vide Criminal Appeal No: 05-60-2002(Q)]

Reported by Usha Thiagarajah

JUDGMENT

Mohd Saari Yusoff JCA:
This appeal is against the decision of the High Court of Sibu Sarawak in which the appellant ("the accused") was convicted on a charge for a capital offence under s. 302 Penal Code and was sentenced to death under the same section.

At the conclusion of hearing of this appeal, we unanimously reduced the charge to one under s. 304(a) Penal Code.

The charge against the accused reads:

> That you, on the 25th day of November, 1994 at about 9.50 p.m. at Kampung Tutus Hilir, Mukah, in the District of Mukah, in the State of Sarawak, committed murder by causing the death of one Awang Jamli b. Awang Sani (m) and that you have thereby committed an offence punishable under Section 302 of the Penal Code.

Briefly, the facts of the case is that on 25 November 1994 after dark Awang Jamli ("deceased") went to have drink at Yong Kong Coffee shop. He drank liquor in the company of PW6 and PW19. Accused also came to have drink at the coffee shop. Accused drank stout. While at the coffee shop, the accused asked for RM1.50 from the deceased. When the deceased did not oblige, accused uttered the words "kedekut", referring to the deceased.

Later that night, from the coffee shop, the deceased adjourned to a junction of Jalan Kampung Tutus Hilir and Jalan Kampung Bedanga, where the deceased indulged in a game of chess with PW6. The accused came to the scene but he left after a short while. However, later in the night, the accused came again at a time when the two persons were finishing their game and were about to disperse. It was at this point in time that a fight ensued between the accused and the deceased.

The following excerpts are taken from the appeal record p. 126:

> Q: Did Awang Jamli respond after you hit him with the axe?
>
> A: Yes. We were struggling with each other.
>
> Q: What happened in the midst of struggling?
>
> A: Awang Jamli said "Alang alang hamun kau berani cucuk terus".
>
> Q: What language was that?
>
> A: Malay.
>
> Q: Do you know the meaning?
>
> A: The meaning is that since he had beaten him if he is daring then he should stab.
>
> A: On hearing this how did you feel?
>
> A: I was very angry and I stabbed at his chest and back. He also punched me.

Further, evidence at p. 138 of AR shows that during the fight the deceased knocked off the axe from the accused's hand which prompted the accused to seize the knife.

Adverting to the cautioned statement (D22), the accused said:

> Sejurus kemudian, Awang Jamli (si-mati) hendak mengambil kapak dia menumbuk dada saya di sebelah kiri. Kemudian saya memukulnya dengan kapak di kepala. Si mati berkata "kalau kau berani cucuk saya"

On the defence of drunkenness and provocation (exception 1) as dealt with by the learned trial judge, we have no quarrel with his lordship's finding. However, what troubled us is with regard to the evidence as enumerated above. Based on the above evidence, it raised a possible defence of a sudden fight as envisaged under exception 4 to s. 300 of the Penal Code, which the learned judge failed to consider (see the case *Haji Talib v. PP* [1969] MLJ 94). The said exception states:

> Exception 4 – Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Such omission, in our view, tantamount to a misdirection.

At the time of the incident, the accused was armed with an axe and a knife. It is quite possible that had the learned judge directed his mind on exception 4, the very nature of the stab wounds inflicted on the deceased, might be held to have taken the case out of the exception by reason of the accused appearing to have taken undue advantage of the deceased and having acted in a cruel or unusual manner. However, this was a question of fact for the learned judge to consider.

In the premise and for reasons given above, we allow the appeal on conviction and substitute therefor a verdict of culpable homicide not amounting to murder, punishable under s. 304(a) of the Penal Code.

On sentence, we agree with the learned DPP that this is a serious offence which costs the life of another human being. The killing was cold-blooded and a deterrent sentence of 18 years' imprisonment from 26 November 1994 (date of arrest) is manifestly adequate in the circumstances. We so impose the sentence. Order of the High Court for disposal of exhibits as stated in (a) and (b) p. 176 D of AR is hereby affirmed.